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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 146

JOSEPH CHOBOT,

Appellant,

v.

STATE OF WISCONSIN,

Appellee.

On Appeal From the Supreme Court of the State of Wisconsin

MOTION TO DISMISS APPEAL

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MOTION TO DISMISS APPEAL

Appellee moves the Court to dismiss the appeal herein on the ground that:

NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED

A. WHERE THE FEDERAL QUESTION PRESENTED IS SETTLED BY PREVIOUS DECISIONS OF THIS COURT IT IS INSUBSTANTIAL AND THE APPEAL WILL BE DISMISSED.

The foregoing rule is supported by the following cases:

Zucht v. King, (1922) 260 U.S. 174;

Minneapolis St. P. & S. S. M. Ry. Co. v. C. L. Merrick Co., (1920) 254 U.S. 376;

2

Heitler v. United States, (1923) 260 U. S. 438.

B. THE QUESTIONS PRESENTED UPON THIS APPEAL ARE SETTLED BY THE DECISION OF THIS COURT IN ROTH V. UNITED STATES, (1957) 354 U. S. 476.

It would be a waste of this Court's time and an unnecessary duplication in printing for us to repeat the arguments so eloquently stated in the opinion of the Wisconsin Supreme Court, *State v. Chobot,* (1961) 12 Wis. 2d 110, 106 N. W. 2d 286 (quoted in appellant's brief, pages 17-27), and of the trial court (quoted in appellant's brief, pages 27-38). These opinions clearly show that the courts below industriously applied to the facts of this case the rule so recently stated by this court in the *Roth* case. Of the 13 exhibits introduced by the state and alleged to be obscene, nine were eliminated on the ground that they did not appeal to prurient interest; only four, which are described in the opinions, were found to be obscene.

The Wisconsin Supreme Court has authoritatively construed the Wisconsin Statute, sec. 944.21 (1) (a), Wis. Stats. (quoted in App.br.p.18), in complete accord with the requirements of *Roth v. United States,* (1957) 354 U. S. 476, and any contention that the construction so placed on the Wisconsin Statute is in violation of the First and Fourteenth Amendments is utterly frivolous.

C. THE APPLICATION OF THE WISCONSIN OBSCENITY STATUTE TO THE FACTS OF THIS CASE IS NOT IN CONFLICT WITH THE FIRST AND FOURTEENTH AMENDMENTS.

The test of *Roth v. United States, supra,* involves two elements:

1. That the material alleged to be obscene appeals to prurient interest; and

2. That it goes substantially beyond the customary limits of candor, applying the standards of the community.

Upon the first point it is doubtless possible for this Court, by examining the material in question, to determine whether its dominant appeal is to prurient interest, as a matter of law. This determination has been made against four of the exhibits by the trial judge, sitting without a jury, and by the unanimous decision of the state supreme court, and reference to a description of the material found to be obscene in the opinions of the trial court (App.br.pp.33-35) and of the Wisconsin Supreme Court (App.br.pp.23-25) sufficiently shows the pornographic character of the exhibits without further argument here.

However, it seems doubtful that this Court intends to undertake the arduous function of examing material found by the state courts to be obscene, every time a convicted defendant appeals to this Court or petitions for *certiorari*. In the *Roth* case the issue of the obscenity of the material found to be obscene in the courts below was not before this Court, yet the conviction was affirmed. From the concurring-dissenting opinion of Mr. Justice Harlan it is to be assumed that the majority did not consider that the application of a correct rule of law to a specific item of literature was a federal constitutional question worthy of the attention of this Court:

> "* * * The Court seems to assume that 'obscenity' is a peculiar genus of 'speech and press,' which is as distinct, recognizable, and classifiable as poison ivy is among other plants. On this basis the *constitutional* question before us simply becomes, as the Court says, whether 'obscenity,' as an abstraction, is protected by the First and Fourteenth

> Amendments, and the question whether a *particular* book may be suppressed becomes a mere matter of classification, of 'fact,' to be entrusted to a fact-finder and insulated from independent constitutional judgment. * * *" 354 U. S. at 497.

The decision of the New York Court of Appeals in the unreported case of *People v. Richmond County News, Inc.* (App.br.pp.39-61), a four to three decision of that court to the effect that the New York obscenity statute applies only to "hard-core" pornography—whatever that may be—does not make a federal question even if it be in conflict with the decision of the Wisconsin Supreme Court in this case. It may be that community standards in New York differ from those in Milwaukee county. Moreover, the New York court and the Wisconsin court were not talking about the same material. The description of the article and pictures involved in the New York case (App.br.p.59) lacks the elements of depravity involved in the Wisconsin case and referred to in the opinions of both courts below (App.br.pp.23-24,34). The two cases are therefore distinguishable on their facts, but they represent at most a divergence of opinion between the two courts within the scope of constitutional limits.

But it is submitted that the majority opinions in the New York case go substantially beyond the constitutional requirements of *Roth v. United States,* (1957) 354 U. S. 476. Nothing in that decision limits the definition of obscenity to "hard-core" pornography, and it appears from the concurring-dissenting opinion of Justice Harlan that the material there involved "cannot be said to be hard-core pornography." 354 U. S. at 508. Nevertheless, the Court affirmed the conviction.

Counsel argues that the following cases are in conflict with the decision of the Wisconsin courts in this case:

Mounce v. United States, (1957) 355 U. S. 180;

One v. Olesen, (1957) 355 U. S. 371;

Times Film Corp. v. City of Chicago, (1957) 355 U. S. 35;

Sunshine Book v. Summerfield, (1957) 355 U. S. 372.

A study of each of these cases clearly establishes that the tests applied by the courts below were not in accord with the test of obscenity approved in *Roth v. United States*, (1957) 354 U. S. 476. In this case the Wisconsin Supreme Court concluded that the reason for reversal in each of those cases was the failure to apply the *Roth* case rule, not a determination that the material in question was, as a matter of law, not obscene (App.br.pp. 24-25).

The second test, the standards of the community, cannot without extreme difficulty be applied by this Court. It is submitted that the trial judge in this case, performing the functions of a jury, is in a much better position to appraise the community standards of Milwaukee county.

In *Roth v. United States*, (1957) 354 U. S. 476, 490, this Court approved an instruction which told the jury, in part, "You may *ask yourselves* does it offend the common conscience of the community by present-day standards. * * * In this case * * * *you and you alone are the exclusive judges of what the common conscience of the community is*, and in determining that conscience you are to consider the community as a whole, young and old, educated and uneducated, the religious and irreligious—men and women and children."

In the present case the trial judge was performing the functions of a jury and it was therefore his duty to determine the common conscience of the community, which he did (App.br. p.35).

Appellant attempts to make a bootstrap argument founded upon the sale in Milwaukee of *Playboy* Magazine, *Peyton Place* and *Lady Chatterley's Lover*. The evidence disclosed that sale of these items was proportionately very small compared with the total of other paperback books, and magazines such as *Readers Digest* (R.60,67,71,83). Even if it be assumed that these books and magazines are of the same kind as the material found by the trial court to be obscene, their relatively meager distribution in the community falls far short of establishing a standard for the community as a whole—if anything it shows rejection of such literature by the overwhelming majority of the population. It cannot be the law that by obtaining *some circulation* for pornographic literature (if that be the case), magazine and book vendors can thereby set a standard for a community which would justify further circulation of like material from that time forward.

The trial court held that the evidence of sales of like material bore no weight as indicative of contemporary community standards not only because it was insignificant but also because the area in the main went beyond the community concerned in this case (App.br.p.35). The state supreme court accepted the trial court as the "exclusive judge of what the common conscience of the community is . . . as a whole." (App.br.p.23.)

Appellant argues (br.pp.7-9), that the "clear and present danger" rule applies in the field of legislation against obscenity. It is a sufficient answer to this contention that this Court quite plainly and unambiguously rejected it in *Roth v. United States*, (1957) 354 U. S. 476, 488, citing and quoting from *Beauharnais v. Illinois*, (1951) 343 U. S. 250, 266.

It is therefore respectfully submitted that the application of the Wisconsin obscenity statute to the material in this case was strictly in accordance with the rules announced by this

court in the *Roth* case, was not erroneous as a matter of law, and presents no substantial question of federal constitutional right.

D. Evidence in this Case Sufficiently Established Scienter.

On this point, again, it seems unnecessary to repeat what was said by the Wisconsin Supreme Court (App.br.pp.25-27) and the trial court (App.br.pp.37-38).

The statute requires proof of *scienter*: "Whoever *intentionally* does any of the following may be" punished as provided in the statute. Sec. 944.21 (1), Wis. Stats.

"• • •

In the Wisconsin Criminal Code the element of *scienter* is included in the definition of criminal intent. This is shown by the following Wisconsin statutes:

> "939.22 Words and phrases defined. In the criminal code, the following words and phrases have the designated meanings unless the context of a specific section manifestly requires a different construction:
>
> "• • •
>
> "(18) 'Intentionally' has the meaning designated in s. 939.23.
>
> "939.23 Criminal intent. (1) When criminal intent is an element of a crime in the criminal code, such intent is indicated by the term 'intentionally', the phrase 'with intent to', the phrase 'with intent that', or some form of the verbs 'know' or 'believe'.
>
> "(2) 'Know' requires only that the actor believes that the specified fact exists.
>
> "(3) 'Intentionally' means that the actor either has a purpose to do the thing or cause the result specified or

lieves that his act, if successful, will cause that result. *In addition,* except as provided in sub. (6), *the actor must have knowledge of those facts which are necessary to make his conduct criminal* and which are set forth after the word 'intentionally'."

Therefore, since the obscenity statute requires *scienter* by requiring that the acts be done "intentionally," the rule of *Smith v. California,* (1959) 361 U. S. 147 is inapplicable, and the trial court specifically found upon sufficient evidence that the defendant was aware of the appeal of the material sold to prurient interest (App.br.p.38). The state supreme court affirmed this ruling (App.br.pp.26-27).

The state supreme court drew from the majority opinion and the concurring opinion of Mr. Justice Frankfurter in the *Smith* case in testing the sufficiency of the proof of *scienter* in the instant case. It is respectfully submitted that there is no substantial federal question presented on this issue.

It is therefore respectfully submitted that the appeal herein be dismissed and that certiorari be denied.

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